Filed 6/15/09 In re E.M. CA2/7

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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SEVEN

In re E.M., a Person Coming Under the Juvenile Court Law.	B211998 (Los Angeles County Super. Ct. No. FJ44083)
THE PEOPLE, Plaintiff and Respondent, v. E.M., Defendant and Appellant.	

APPEAL from an order of the Superior Court of Los Angeles County, Shep A. Zebberman, Temporary Judge. (Pursuant to Cal. Const., art. VI, § 21.) Affirmed.

James M. Crawford, under appointment by the Court of Appeal, for Defendant and Appellant.

Edmund G. Brown, Jr., Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Pamela C. Hamanaka, Senior Assistant Attorney General, David C. Cook and Eric J. Kohm, Deputy Attorneys General, for Plaintiff and Respondent.

The minor E.M. appeals from the juvenile court's order declaring him a ward of the court and placing him home on probation, contending there was insufficient evidence to support the finding he made a criminal threat (Pen. Code, § 422). We affirm the order.

FACTUAL AND PROCEDURAL BACKGROUND

On the afternoon of September 29, 2008, the minor and his father began arguing at home over the minor's failure to attend school. The argument became heated, and Edward, the minor's older brother[1] intervened, which further angered the minor. He told Edward he "was going to send his friends to get [Edward]" or "to beat [Edward] up." Edward replied, "Go for it; call your friends." The brothers started "wrestling" on the floor, with Edward attempting to restrain the minor as the minor kept trying to fight him. During the struggle, the minor grabbed Edward's necklace and pulled it, cutting Edward's neck. When Edward managed to pin him down, the minor "lost control" and said to Edward, "I'm going to kill you." Edward continued to restrain the minor on the floor until the minor stopped resisting.

At a contested jurisdiction hearing, Edward testified concerning the incident as described above. During his testimony, Edward insisted he was not frightened by minor's threats to kill him and to have some friends beat him up, believing the minor was merely acting impulsively in anger, which was consistent with the minor's past behavior. Edward further testified he did not recall telling police the minor's threats made him fear for his safety. Edwards also denied telling police he thought the minor would carry out these threats.

Los Angeles Police Department Officer Frank Garcia testified on the afternoon of September 29, 2008, he spoke to Edward at home following the incident. Edward's voice was "shaky" and his hands were trembling during the interview. Edward repeatedly told Officer Garcia he feared for his safety, believing the minor "would carry out his threat."

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[1] Because the minor and his brother share the same surname, we refer to his brother by his first name.

Edward also said he believed the minor was associating with potential gang members who would come after Edward and kill him.

At the conclusion of the People's case, the juvenile court denied the minor's motions to dismiss the petition (Welf. & Inst. Code, § 701.1) and to reduce the offense to a misdemeanor (Pen. Code, § 17, subd. (b)). The minor did not testify in his own defense. Officer Garcia testified briefly for the defense.

After hearing the balance of the evidence and argument from counsel, the juvenile court sustained the petition, but decided to grant the motion to reduce the offense to a misdemeanor. The court expressly found Officer Garcia's testimony to be credible and discounted Edward's testimony as prompted by his desire not to testify against his brother. The minor was declared a ward of the court and placed home on probation.[2]

DISCUSSION

1. *Standard of Review*

The same standard of appellate review is applicable in considering the sufficiency of the evidence in a juvenile proceeding as in reviewing the sufficiency of the evidence to support a criminal conviction. (*In re Cheri T.* (1999) 70 Cal.App.4th 1400, 1404; *In re Jose R.* (1982) 137 Cal.App.3d 269, 275.) In either type of case we review the whole record in the light most favorable to the judgment to determine whether it discloses substantial evidence -- that is, evidence that is reasonable, credible and of solid value --

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[2] The minor's additional challenge is well taken: The juvenile court declared the offense to be a misdemeanor. (See Welf. & Inst. Code, § 702.) The court also set the maximum period of physical confinement at one year. However, because the minor was placed home on probation, the court's calculation of that maximum term of physical confinement is of no legal effect. (See *In re Ali A.* (2006) 139 Cal.App.4th 569, 572-574 [when minor placed home on probation, juvenile court is not required to include maximum term of confinement in disposition order; maximum term of confinement contained in such an order is of no legal effect]; *In re Joseph G.* (1995) 32 Cal.App.4th 1735, 1744 ["[o]nly when a court orders a minor removed from the physical custody of his parent or guardian is the court required to specify the maximum term the minor can be held in physical confinement"].)

from which a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt. (*People v. Ochoa* (1993) 6 Cal.4th 1199, 1206; *People v. Jones* (1990) 51 Cal.3d 294, 314.)

This standard applies to review of convictions under Penal Code section 422 for making a criminal threat when, as here, the defendant does not claim his or her words were constitutionally protected speech under the First Amendment. (*In re George T.* (2004) 33 Cal.4th 620, 630-634.)[3]

2. *The Evidence Supports the Juvenile Court's Finding That the Minor Violated Penal Code Section 422*

To establish the offense of making a criminal threat, the People must prove: (1) the defendant willfully threatened to commit a crime that would result in death or great bodily injury; (2) the defendant made the threat with the specific intent it be taken as a threat; (3) the threat, on its face and under the circumstances in which it was made, was so unequivocal, unconditional, immediate and specific as to convey to the victim threatened a gravity of purpose and an immediate prospect of execution of the threat; (4) the threat caused the victim to be in sustained fear for his or her own safety or for his or her immediate family's safety; and (5) the victim's fear was reasonable. (Pen. Code, § 422; *In re George T., supra*, 33 Cal.4th at p. 630; *People v. Toledo* (2001) 26 Cal.4th 221, 227-228.) Penal Code section 422 "'was not enacted to punish emotional outbursts, it targets only those who try to instill fear in others.'" (*In re Ryan D.* (2002) 100 Cal.App.4th 854, 861.)

The minor contends there is no substantial evidence that Edward actually considered his words as threats or that Edward experienced sustained fear. Relying on *In re Ricky T.* (2001) 87 Cal.App.4th 1132 (*Ricky T.*), the minor suggests his remarks were

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[3] In *In re George T., supra*, 33 Cal.4th at page 632, the Supreme Court held "a reviewing court should make an independent examination of the record in a [Penal Code] section 422 case when a defendant raises a plausible First Amendment defense to ensure that a speaker's free speech rights have not been infringed by a trier of fact's determination that the communication at issue constitutes a criminal threat." The minor has not raised such a First Amendment defense.

the result of an emotional outburst as shown by Edward's testimony: Knowing the minor tended to make such remarks in anger, Edward testified he was never in actual fear, testimony which, according to the minor, was bolstered by Edward's relative ease in physically overpowering the minor at the time. As for Officer Garcia's testimony, the minor maintains it was ambiguous, because the officer did not specify which of the two statements, or both, supposedly instilled fear in Edward. The minor also claims the officer's testimony failed to establish that Edward's professed fear was more than just fleeting or transitory.

The minor's reliance on *Ricky T.*, *supra*, 87 Cal.App.4th 1132 is misplaced. In *Ricky T.* a 16-year-old student left a classroom to use the restroom. When the student returned, he pounded on the locked door. The teacher opened the door outward and hit the student's head. Angry, the student cursed and told the teacher, "'I'm going to get you'" or "'I'm going to kick your ass.'" The teacher felt physically threatened but conceded the student did not make a specific threat or engage in any other aggressive act. (*Id*. at pp. 1135, 1136, 1138.)

The *Ricky T.* court held, in context, the student's outbursts were not serious, deliberate statements of purpose. The supposed threats were ambiguous, and there was no evidence a physical confrontation was imminent. (*Ricky T.*, *supra*, 87 Cal.App.4th at pp. 1137-1138.) Additionally, the court found there was insufficient evidence the teacher was in sustained fear beyond the time of the student's statements that was reasonable under the circumstances. (*Id*. at p. 1140.) The court concluded the student's "intemperate, rude, and insolent remarks" constituted an emotional reaction to an accident rather than a criminal threat. (*Id*. at pp. 1138, 1141.)

Unlike the situation in *Ricky T.*, the minor's threats, "I'm going to kill you" and "I'm going to send my friends to beat you up," separately or in combination, were specific and unequivocal threats of harm, and were not triggered by an accidental blow or other sudden stimulus. The minor's first threat, to have Edward beaten up by his friends, was uttered when Edward interfered in the minor's dispute with their father, causing the minor to turn his anger toward his brother. The minor's second threat, that he would kill

Edward, was made following when he was pinned to the floor after fighting with Edward. In contrast to *Ricky T.*, where there had been no prior confrontations between the student and the teacher, Edward had either witnessed or been the subject of the minor's uncontrollable anger in the past. Indeed, it was the reason Edward decided to try to physically restrain the minor. Additionally, in *Ricky T.* the evidence revealed the teacher felt nothing more than fleeting or transitory fear during the verbal encounter with the student, whereas here, the fear the minor instilled in Edward was apparent during the police interview, beyond the time of the threats and physical confrontation.

In sum, there was ample evidence Edward feared for his safety and believed the minor posed an actual threat to him. Edward's testimony he felt no fear neither negated its existence nor defeated the juvenile court's finding, but merely served to create a conflict in the evidence to be resolved by the trier of fact. We may not invade the province of the fact finder by reweighing the evidence, reevaluating the credibility of witnesses or substituting our own conclusions for the jury's findings. (*People v. Ochoa, supra,* 6 Cal.4th at p. 1206; see *People v. Diaz* (1992) 3 Cal.4th 495, 541.) The evidence, therefore, is sufficient to support the juvenile court's finding.

DISPOSITION

The order under review is affirmed.

WOODS, Acting P. J.

We concur:

ZELON, J. **JACKSON, J.**